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PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS FOR MARCH.

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Attorney, Suspension, Effect

The Supreme Court of Oklahoma, in *Brown* v. *Woods*, 39 Pac. Rep. 473, has lately held, that an attorney-at-law, who has been suspended from the practice of law in the district court of a county in which he has been elected county attorney, is not eligible to enter upon the performance of the duties of that office, so long as the order of suspension remains in full force, and not reversed.

Carriers, Ejection of Passenger, Exemplary Damages

A passenger who leaves a street car in obedience to an order of a policeman called by the conductor to remove him, is not restricted to damages for the trouble in being put off the car, and the additional expense necessary to complete his journey: *Laird* v. *Pittsburgh Traction Co.*, (Supreme Court of Pennsylvania,) 31 Atl. Rep. 51.

Certiorari, Search Warrant

A certiorari will not lie to review the action of a magistrate in issuing what is commonly known as a "search warrant:" *State* v. *Springer*, (Supreme Court of New Jersey,) 31 Atl. Rep. 215.

Conflict of Laws, State and Federal Jurisdiction

The Supreme Court of California has recently decided, that, since the jurisdiction of a state over crimes committed within its territory is general, and that of the United States is exceptional, depending upon the fact that it has purchased land, with the consent of the state legislature, for forts, arsenals, and other buildings, it is not necessary, in an indictment in the state courts, to negative the jurisdiction of the federal courts: *Peo.* v. *Collins*, 39 Pac. Rep. 16.

Constitutional Law, Test Principles

In view of the free and easy way in which some courts are in the habit of playing with the constitutionality of statutes, it may be well to quote and commend the language of the Supreme Court of Michigan, apropos of this subject, in a recent case: "The power of declaring laws unconstitutional should be exercised with extreme caution, and never where serious doubt exists as to the conflict. In case of doubt, every possible presumption, not clearly inconsistent with the language and the subject-matter, is to be made in favor of the constitutionality of the act:" *Rouse* v. *Donovan*, 62 N. W. Rep. 359.

Amendment to Constitution, Time of Taking Effect

A constitutional amendment does not take effect before the canvass of the vote by which it is adopted: *City of Duluth* v. *Duluth St. Ry. Co.*, (Supreme Court of Minnesota,) 62 N. W. Rep. 267.

Obligation of Contracts

The Supreme Court of Illinois has held, in *Ford* v. *Chicago Milk Shippers' Assn.*, 39 N. E. Rep. 651, that when an act declares certain combinations to control prices illegal, and provides that a purchaser of any articles from any individual or corporation doing business in violation of the act, shall not be liable for the price of that article, and may plead the act as a defense to a suit for the price, the latter provision is not unconstitutional, as impairing

the obligation of contracts, even when the contracts in question were made before the passage of the act, if the articles were supplied to the purchaser after its passage.

Police Power

The Court of Appeals of New York has recently decided, in spite of the dissent of Judges PECKHAM, O'BRIEN and BARTLETT, that, though the legislature cannot, under the guise of the police power, enact measures which restrain the citizen in the free pursuit of a lawful occupation, yet an act, which forbids any person to exercise the calling of a master plumber without passing an examination before a board thereby created, is a valid exercise of the police power, since the work of plumbing is essential to the comfort and health of the inhabitants of cities; and that the act is not void (1) as restraining individuals from working as plumbers, since it applies only to master or employing plumbers; (2) Nor as creating a monopoly, though the act applies only to master or employing plumbers, and requires two of the five members of the board to be employing plumbers; (3) Nor because the board acts unfairly or oppressively in the examination of applicants, since it provides for the appointment of an impartial board: *Peo. ex rel. Nechamcus* v. *Warden of City Prison*, 39 N. E. Rep. 686; affirming 30 N. Y. Suppl. 1095.

Judge PECKHAM, in his dissenting opinion, very clearly proves the utter absurdity of the attempt of the majority to rest the validity of this law upon the fancied security that it affords the public against unsanitary plumbing, by pointing out the simple fact that it neither provides for an examination of the journeymen plumbers, who do the real work, nor requires any careful supervision of that work by the master plumber who employs them; and also indicates this very serious defect, that the act leaves the requirements of the examination wholly to the discretion of the examining board, who may make that examination either so easy as to defeat any possible benefit that may result, or so difficult as to shut out all applicants, and so secure to the master plumbers already licensed a practical monopoly of the business. This decision is a flagrant example of the abuse of the police power; and one that should have called forth a reproof rather than a com-

mendation from the court. If the present drift of judicial opinion on the extent of the police power continues, we may expect to have, in a few years, examinations for garbage collectors and for street cleaners, in order to provide for the proper protection of the public health; it being well known that negligence in these matters is the cause of a great deal of disease.

The Supreme Court of the same state has recently held, that an act providing that no person not vaccinated shall be admitted to any of the public schools of the state is constitutional: *In re Walters*, 32 N. Y. Suppl. 322.

Compulsory Vaccination

In Pennsylvania, it has been held that the school board of a city has the right, by virtue of its discretionary powers, to exclude a pupil who will not submit to be vaccinated during a small-pox scare: *Duffield* v. *School District of Williamsport*, 29 Atl. Rep. 742.

An agreement by property owners and persons engaged in business in the immediate neighborhood of a post office, to pay the owners of the building in which it is located a specified sum monthly for a certain time, in case the building is rented to the government for a nominal sum, in order to retain the post office in that locality, is founded on sufficient consideration, and is not void, as against public policy: *Fearnley* v. *De Mainville*, (Court of Appeals of Colorado,) 39 Pac. Rep. 73.

Contract, Public Policy

The Supreme Court of the United States has just decided one of the most vexed questions of criminal law,—that of the power of the jury to judge of the law of the case, as well as the facts. It held, in accord with the better reasoning, that the court, in criminal as well as in civil cases, is alone empowered to determine the law; and that therefore it may refuse to charge on degrees of homicide of which there is no evidence, and may state that, under the evidence, there must either be an acquittal, or a conviction of murder: *Sparf* v. *United States*, 15 Sup. Ct. Rep. 273.

Criminal Law, Functions of Court and Jury

But while the general proposition is unquestionably sound, *pace* the palliator of crime, the application of it to this particular case may well be questioned. The ruling of the lower court comes perilously near to a ruling on the effect of the evidence; and there would therefore seem to be much reason for the dissent of Justices GRAY and SHIRAS. The dissenting opinion of the former is a very full and profound exposition of the history of the controversy on this point, and the reasons for the opinion contrary to that of the majority of the court; and is well worth careful study, even if it fails to convince.

Information without Affidavit

In the opinion of the Supreme Court of South Carolina, a prosecuting officer may, on his own motion, present a bill to the grand jury, without presenting an affidavit charging the offence, if he deems it necessary for the public good; and his action in doing so will be disturbed only in case of abuse of discretion: *State* v. *Bowman*, 20 S. E. Rep. 1010.

Discharge, Rearrest

When a prisoner, after pleading guilty, is allowed to go out of custody without bail, the court has no further jurisdiction over him, and cannot, at a subsequent term, order his rearrest, and pronounce sentence upon him: *Peo.* v. *Allen*, (Supreme Court of Illinois,) 39 N. E. Rep. 568.

Damages, Evidence, Mortality Tables

In an action for the death of the plaintiff's son, on the ground that the plaintiff has been deprived of his son's support, the "Insurance Experience Life Tables" are admissible to show the probable duration of the plaintiff's life, though he is in poor health; the latter circumstance only affects the weight to be given them: *Galveston, H. & S. A. Ry. Co.* v. *Leonard*, 29 S. W. Rep. 955.

There is an article on the admissibility of life and mortality tables in evidence, in 36 Cent. L. J. 75, which contains most of the important cases decided up to that time; but it may not be amiss to cite the more recent decisions on this point.

Any standard life tables, properly identified, are admissible, in case of death or permanent injury, to show the probable duration of life of the deceased or injured person: *Richmond & Danville R. R.* v. *Garner*, 91 Ga. 27; S. C., 16 S. E. Rep.

110; *e. g.*, the Carlisle tables; *Louisville, N. O. & C. Ry. Co.* v. *Miller*, (Ind.) 37 N. E. Rep. 343; the American Mortality tables; *Richmond & Danville R. R.* v. *Hissong*, 97 Ala. 187; S. C., 13 So. Rep. 209; *Louisville & N. R. Co.* v. *Hurt*, (Ala.) 13 So. Rep. 130; *Greer* v. *Louisville & N. R. Co.*, (Ky.) 21 S. W. Rep. 649; or any life tables shown to be used by all life insurance companies as a basis for life insurance; *Gulf C. & S. F. Ry. Co.* v. *Smith*, (Tex.) 26 S. W. Rep. 644. They are admissible, even though the plaintiff is engaged in a more hazardous occupation than that with reference to which they were made up: *Birmingham Mineral R. R. Co.* v. *Wilmer*, 97 Ala. 165; S. C., 11 So. Rep. 886.

They are not conclusive in any case, but are merely evidence to go to the jury, and to be weighed as any other matter of evidence: *Mary Lee Coal & Ry. Co.* v. *Chambliss*, 97 Ala. 171; S. C., 11 So. Rep. 897; *City of Friend* v. *Ingersoll*, (Neb.,) 58 N. W. Rep. 281; and therefore cannot alone form a rule as to the probable duration of life; *Morrison* v. *McAtee*, 23 Oreg. 530; S. C., 32 Pac. Rep. 400. Before they can be admitted, a foundation must be laid by proving the age of the person concerned, or by introducing evidence from which his age can be inferred or approximately arrived at by the jury: *Atlantic Consolidated St. Ry. Co.* v. *Beauchamp*, (Ga.,) 19 S. E. Rep. 24.

It has been held that the courts will take judicial notice of standard tables, such as the American Mortality tables: *Louisville & Nashville R. R.* v. *Mothershed*, 97 Ala. 261; S. C., 12 So. Rep. 714; which would of course dispense with the necessity of authenticating them.

Easement

Vice-Chancellor Pitney, of the Court of Chancery of New Jersey, has recently decided a novel and interesting case on the subject of easements. The owner of a house, with a yard attached, had placed a water pipe, leading from a driven well in the yard to a sink in the kitchen of the house, there ending in a pump, by which water could be and was habitually drawn from the well to the kitchen for domestic purposes. Both the well and the pipe were completely hidden from view. The vice-chancellor held, under

these circumstances, that the pipe formed an apparent and continuous easement, which would pass as appurtenant to the dwelling by a conveyance of the latter alone, the former owner of both still retaining the yard; and that the same result would follow a simultaneous conveyance of the house and yard by the owner to different persons, provided that the grantee of the house and well had notice of the existence of the connection between the well and the pump, and of the other conveyance, and that that conveyance was made with his consent: *Larsen* v. *Peterson*, 30 Atl. Rep. 1094.

Elections, Rival Conventions

In *State* v. *Allen*, 62 N. W. Rep. 35, the Supreme Court of Nebraska has decided, that under the Ballot Law of that State, (which is in this respect but little different from those of other states which have adopted the Australian Ballot System, or one of its modifications,) it is not the province of the secretary of state to determine which of two rival state conventions of the same party is entitled to recognition as the regular convention; and that therefore, when two factions of a political party nominate candidates, and certify such nominations to the secretary of state in due form, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each. The Supreme Court of Colorado has gone a step farther, and holds that neither the secretary of state, nor the courts, have power to decide which of two rival conventions of a political party has the right to act for the party: *Peo.* v. *Dist. Ct. of Arapahoe County*, 31 Pac. Rep. 339.

The New York decisions (in the Supreme Court) are not quite uniform. It has been held, on the one hand, that when a minority faction of a party secedes, and organizes separately, the decision of the majority faction that certain persons were duly elected members at a caucus of the party is not conclusive, but reviewable by the court: *In re Broat*, 27 N. Y. Suppl. 176; S. C., 6 Misc. Rep. 445; but on the other, that a determination by the state convention of a party on a contest between two delegations, as to the regularity of the conven-

tions by which they were nominated, will be treated by the courts as conclusive: *In re Redmond*, 25 N. Y. Suppl. 381: S. C., 5 Misc. Rep. 369; even though contrary to a previous judicial determination of the same question: *In re Pollard*, 25 N. Y. Suppl. 385. The latter seems to be the true doctrine, as the decisions of a political convention, like those of any other tribunal of limited jurisdiction, ought to be conclusive on matters within its jurisdiction, unless there exist grounds for equitable relief, or express authority to interfere has been given to the courts of law by statute.

Voters, Inmates of Home

An inmate of a veterans' home, who intends to stay there as long as he lives, is a resident of the precinct in which the home is located, and qualified to vote as such, though he became an inmate of the home solely because of his indigent circumstances: *Stewart* v. *Kyser*, (Supreme Court of California,) 39 Pac. Rep. 19.

But under the Constitution of Michigan, Art. 7, § 5, providing that no elector shall be deemed to have gained or lost a residence, "while kept at any almshouse or other asylum at public expense," a person who becomes an inmate of a soldiers' home gains no residence in the municipality where the home is located, whatever may be his intention in entering it: *Wolcott* v. *Holcomb*, 97 Mich. 361; S. C., 56 N. W. Rep. 837; *Peo.* v. *Hanna*, 98 Mich. 515; S. C., 57 N. W. Rep. 738.

Voters, Students

The question as to the right of a student at an educational institution to vote, there or elsewhere, has received a full exposition in, and may now, perhaps, be considered as finally settled, by the decision of the Supreme Court of Nebraska, in *Berry* v. *Wilcox*, 62 N. W. Rep. 249. In that case, the rulings were as follows: (1) The fact that one is a student at an educational institution of itself has no bearing upon his right to vote at that place; if his residence is there, he may vote there, if otherwise qualified: (2) A person's residence is where he has his established home, where he is habitually present, and to which he intends to return, whenever he departs therefrom; the fact that he may intend to definitely remove therefrom

at some future time does not defeat his residence there, until he actually does remove; and it is not necessary that he should have the intention of always remaining, but he must not have an intention of presently removing: (3) Persons, otherwise qualified to vote, who come to an educational institution mainly for the sake of obtaining an education; who do not depend on their parents for support, do not intend to return to their parental home when their studies are completed, and are accustomed to leave the institution during vacation, going wherever they can find employment, and returning to the institution when the term opens; who regard the seat of the institution as their home, and have no fixed purpose as to their movements after completing their studies, are entitled to vote at the place where the institution is located.

As a rule, the residence of a student at an institution of learning remains, for purposes of voting, with his parents: *Fry's Appeal*, 71 Pa. 302; *In re Lower Merion Election*, 1 Chest. Co. Rep. (Pa.) 257. But, in the absence of statutory regulations, a student who leaves his home to go to college, and definitely abandons his home, may gain a residence at the college: *In re Ward*, 20 N. Y. Suppl. 606; S. C., 29 Abb. N. C. 187; *In re Lower Oxford Contested Election*, 11 Phila. 64; S. C., 1 Chest. Co. Rep. (Pa.) 253. So, a student who went to college, and stayed there for seven years, acting during vacations as waiter at different summer resorts, supporting himself by his own efforts, and only making brief visits to his former home, will be held to have acquired a residence at the college: *Shaeffer* v. *Gilbert*, 73 Md. 66; S. C., 20 Atl. Rep. 434. The burden of proof, however, to establish change of residence, rests in any case upon the student claiming to vote by reason thereof: *In re Lower Oxford Contested Election*, 11 Phila. 64; S. C., 1 Chest. Co. Rep. (Pa.) 253.

But under the present Constitution of New York, Art. 2, § 3, providing that no person shall be deemed to have gained a residence, for purposes of voting, while a student in any seminary of learning, it is immaterial that a student has no other domicile than the seminary: *Goodman* v. *Bainton*,

(Supreme Court of New York,) 31 N. Y. Suppl. 1043. This, however, is an extreme case, and would hardly seem to be within the reasonable intendment of the constitution.

Ballots, Marking

The Supreme Court of Minnesota has proved its ability, by being almost the only court to give a liberal interpretation to the provisions of the Australian Ballot Laws for marking ballots. That court has held, in *Pennington* v. *Hare*, 62 N. W. Rep. 116, that though those provisions are mandatory, yet any mark, however crude and imperfect in form, if it is apparent that it was honestly intended as a cross-mark, and for nothing else, must be given effect as such; *otherwise electors unaccustomed to the use of pen or pencil might be disfranchised.* It also ruled, that a ballot marked with the name of the voter could not be counted, as it came within the prohibition of the use of a distinguishing mark; but Collins, J., in a very able dissenting opinion, urges the validity of such ballots with almost convincing force.

Evidence, Confessions

A witness may testify to a confession which he swears was made by the accused to a third person in the dark, although the witness states that he did not see the accused, but only knew him by his voice; the testimony is admissible, its value being a question for the jury: *Fussell* v. *State*, (Supreme Court of Georgia,) 21 S. E. Rep. 97.

Confidential Communications.

A person who overhears a conversation between an attorney and his client, and who stands in no confidential relation to either, may testify to the conversation: *People* v. *Buchanan*, (Court of Appeals of New York,) 39 N. E. Rep. 846.

Evidence of Deceased Witness

According to the Supreme Court of the United States, the reading in evidence on the second trial of a cause of a transcribed copy of the reporter's stenographic notes of the testimony of a witness for the prosecution who has died since the first trial, is not an infringement of the constitutional provision that the accused shall be confronted with the witnesses against him: *Mattox* v. *United States*, 15 Sup. Ct. Rep. 337.

The Court of Appeals of New York has administered a

deserved rebuke to the absurd lengths to which expert evidence is now carried, though in terms much milder than the case warranted. On the trial of the notorious Dr. Buchanan, for the murder of his wife, one of the jurors, while at dinner at a hotel, after the case had been submitted to the jury, was suddenly taken ill, and fainted. Physicians, expert in mental diseases, examined the juror, and gave it as their opinion that he was not affected with epilepsy or paresis; and that his symptoms resembled those of nervous exhaustion, due to his close confinement as a juror. The juror himself denied ever having suffered from epileptic attacks; and physicians who had known and attended him testified that he had never manifested any symptoms of nervous disease. And yet other physicians were found, total strangers, who had no knowledge of the facts other than that gained from the statements of others, who dared to testify that, in their opinion, the attack was of an epileptic character, and indicated a mental disturbance that must have existed for several hours, and have rendered his mental action unreliable and useless. This testimony was very properly held not to show that the juror was mentally incapable of concurring in the verdict, and therefore not good ground for setting it aside: *Peo.* v. *Buchanan*, 39 N. E. Rep. 846. This case, in common with many other recent ones, goes to show how utterly unreliable the testimony of the average expert is, especially when he has a pecuniary stake in the question at issue,

Evidence of Expert

The incumbent of an office, which it was attempted to create by an unconstitutional statute, cannot be guilty of extortion, as he is neither a *de jure* nor a *de facto* officer: *Kitby* v. *State*, (Supreme Court of New Jersey,) 31 Atl. Rep. 213.

Extortion

The Supreme Court of Georgia has lately held, that the rule of the road, which requires travelers with vehicles, when meeting, to each turn to the right, exists for the benefit of travelers only, and not for the behoof of one who has wrongfully caused a bad condition of the road or street. One may, from motives of

Highways, Rule of the Road

courtesy, or for other reasons, waive his right to have another observe this rule, but is not bound to do so; and the fact that he does waive it, and in so doing drives into a dangerous place in the highway, and is thereby injured, affords no excuse to a wrongdoer who caused the dangerous place to exist, and will not prevent a recovery against such wrongdoer by the person so injured, if the latter is free from negligence, and otherwise entitled to recover: *Atlanta St. Ry. Co.* v. *Walker*, 21 S. E. Rep. 48.

The rule of the road has been adopted by statute in most, if not all, of the states of the Union; but it is not an absolute requirement, which must be obeyed at all hazards. It only applies to vehicles meeting and passing each other, and others are not required to observe it: *Johnson* v. *Small*, 5 B. Mon. (Ky.) 25; *Brooks* v. *Hart*, 14 N. H. 307; *Parker* v. *Adams*, 2 Metc. (Mass.) 418. There are even exceptions to its observance in the case of vehicles meeting and passing each other; *e. g.*, it is the duty of a light vehicle to give place to a much heavier and more unwieldy one: *Grier* v. *Sampson*, 27 Pa. 183. Accordingly, the mere fact that a driver meeting another vehicle turns to the left instead of to the right, is no bar to a recovery for damages occassioned by a defect in the highway: *Grier* v. *Sampson*, *supra*; *O'Neil* v. *Town of East Windsor*, 63 Conn. 150; S. C., 27 Atl. Rep. 237; nor even to a recovery for damages caused by a collision with the other vehicle: *Riepe* v. *Elting*, (Iowa,) 56 N. W. Rep. 285. It is not contributory negligence to turn to the left, in the hope of allowing another, driving on the same side of the road, to pass: *Schimpf* v. *Sliter*, 64 Hun, (N. Y.) 463. It is a sufficient excuse for leading a horse on the left side of the street, that the right side was crowded with cars, trucks, and other vehicles: *Mooney* v. *Trow Directory, Printing & Bookbinding Co.*, 21 N. Y. Suppl. 957; S. C., 2 Misc. Rep. 238; and the fact that one is found on the wrong side of the road is not conclusive evidence of fault: *Randolph* v. *O'Riordan*, 155 Mass. 331.

The rule of the road was never meant to apply to a highway formed by the junction of two streets crossing each other

diagonally: *Norris* v. *Saxton*, 158 Mass. 46; S. C., 32 N. E. Rep. 954. Where it does apply, however, it requires a driver meeting another to keep to the right of the centre of the *worked* part of the road, not to the right of the centre of the smooth or traveled part: *Earing* v. *Lansingh*, 7 Wend. (N. Y.) 185.

Homicide, Rescue of Person Kidnapped

The Court of Appeals of Kentucky, in *Commonwealth* v. *Delaney*, 29 S. W. Rep. 616, has ruled, that when a person is kidnapped, his friends may undertake his rescue, and in case of resistance, may use such force as will be necessary to accomplish the rescue; and if the kidnappers attack them, and one of their number, in defending himself, shoots and kills any one, without intending to do so, the homicide is excusable. This is a reassertion of the rule laid down on the first hearing of this case in error: 25 S. W. Rep. 830.

Husband and Wife, Fraud on Maratil Rights

The Supreme Court of Indiana has lately held, in *Stroup* v. *Stroup*, 39 N. E. Rep. 864, that when a husband, intending to defeat his wife's dower, has land purchased by him conveyed to another, but secures the full use and disposition thereof to himself, the wife, as the conveyance is in fraud of her, may, *either before or after* the husband's death, recover that part of the land which would have fallen to her as dower, had her husband been actually seised; and further, that when a husband purchases land, and causes it to be conveyed to another in trust for himself, reserving a life estate in it, and retaining a power of disposition over it to his own use, he has an equitable interest therein, to which dower may attach.

Ice, Remedy for Injury

Riparian owners on navigable streams have no title to the ice which forms on such streams, as an incident to their ownership of the bank; and if a statute gives them title to the ice opposite their property, and prescribes a remedy for invasion of their rights therein, that remedy is exclusive: *Briggs* v. *Knickerbocker Ice Co.*, (Supreme Court of New York,) 32 N. Y. Suppl. 95. There

is an annotation on the subject of property in ice, in 32 AM. L. REG. & REV. 166.

The Supreme Court of the United States, in *Emert* v. *State of Missouri*, 15 Sup. Ct. Rep. 367, has recently decided, that a state law prohibiting peddlers, who deal in selling goods by going from place to place to sell the same, from peddling without a license, which must state how the dealing is to be carried on, and must also be exhibited on demand to any sheriff, collector, constable, or citizen householder of the county, is not an invasion of the power of Congress to regulate interstate commerce, as applied to one who, as agent of a manufacturer in another state, in this way sells and delivers sewing machines which he has with him at the time of soliciting purchases: affirming *State* v. *Emert*, 103 Mo. 241; S. C., 15 S. W. Rep. 81.

Interstate Commerce, Peddlers, License Tax

This is a material qualification of the rule announced in *Brennan* v. *Titusville*, 153 U. S. 289, that a state cannot impose a license tax on agents soliciting orders for goods manufactured out of the state; and shows an appreciation of the difficulties which a strict adherence to that doctrine was bound to cause. It is a promise of better things to come.

A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force, when sued on in another state, as a judgment in adversary proceedings; an action thereon can only be defeated by want of jurisdiction in the court, by fraud in procuring the judgment, or by defences based on matters arising after the judgment was rendered; such defences as payment before judgment, the bar of the statute of limitations to the foreign judgment, or any other defence which applies to the original cause of action, are conclusively negatived by the judgment; but the sufficiency of the warrant to authorize the judgment may be inquired into, and is to be determined from the evidence of the laws of the state of its entry: *Snyder* v. *Critchfield*, (Supreme Court of Nebraska,) 62 N. W. Rep. 306.

Judgment, Foreign, Warrant of Attorney

A defendant who joins with the jurors in drinking at the

plaintiff's expense, and who gives the court no notice of the occurrence until after the verdict is rendered, cannot urge, on a motion to set aside the verdict, that the jurors were influenced in plaintiff's favor by the gift of the liquor: *Bradshaw* v. *Degenhart*, (Supreme Court of Montana,) 39 Pac. Rep. 90.

Jury, Improper Influence

When the jury, during the progress of a trial for murder, read newspaper accounts of the proceedings, which report them correctly, and contain nothing of an unfair or prejudicial nature, they are not guilty of such misconduct as to require the granting of a new trial: *Peo.* v. *Leary*, (Supreme Court of California,) 39 Pac. Rep. 24.

Misconduct, Reading Newspapers

The same court holds, in accord with the general rule, that affidavits of jurors that they had read newspaper reports of the cause they were trying, during its progress, are not admissible to impeach their verdict: *Peo.* v. *Azoff*, 39 Pac. Rep. 59. See 1 AM. L. REG. & REV. (N. S.) 877.

Impeaching Verdict

As the affidavits of the jurors themselves are incompetent to impeach their verdict, affidavits made by others, which purport to contain statements made by jurors, during alleged conversations with them after the trial of the case was closed, and they had been discharged, in reference to matters which occurred in the jury room during the deliberations of the jurors, are also incompetent, as resting on the mere statements of the jurors themselves: *Peterson* v. *Skjelver*, (Supreme Court of Nebraska,) 62 N. W. Rep. 43.

To the same effect is *State* v. *Schaefer*, (Mo.,) 22 S. W. Rep. 447.

It is no defence to an action for malicious prosecution, that the complaint was sworn to by the chief of police, when he was induced to do so by the defendant, and acted, in doing so, on information furnished by the defendant: *Tangney* v. *Sullivan*, (Supreme Judicial Court of Massachusetts,) 39 N. E. Rep. 799.

Malicious Prosecution, Liability of Instigator

The mayor of a city is not liable to an action of malicious

Prosecution by Mayor under void Ordinance

prosecution, for causing the arrest of a person under a city ordinance subsequently declared invalid, when he acted in good faith, though at the time of the arrest he had some doubts as to the validity of the ordinance, and its enforcement rested exclusively with the board of public works, which had refused to enforce it, because they believed it to be invalid: *Goodwin* v. *Guild*, (Supreme Court of Tennessee,) 29 S. W. Rep. 721. See 1 AM. L. REG. & REV. (N. S.) 591, 865; 2 AM. L. REG. & REV. (N. S.) 23, 94.

Master and Servant, Railroads, Liability for Acts of Employes

A railroad company is not liable for the act of a brakeman, who pushes a trespasser from one of its trains, because the trespasser will not pay for the privilege of riding, the money not being demanded as fare, and the brakeman having no authority to collect fares; such an act is not within the scope of his duty: *Illinois Cent. R. Co.* v. *Latham*, (Supreme Court of Mississippi,) 16 So. Rep. 757.

TradesUnions, Membership Forbidden

Judge Dallas, of the Circuit Court for the Eastern District of Pennsylvania, has recently rendered a decision on a novel point of law, in *Platt* v. *Phila. & Reading R. R. Co.*, 65 Fed. Rep. 660. The railroad company had, in 1887, adopted a rule that no one would be employed by it who was a member of a labor organization, unless he would agree to withdraw therefrom; and from that time required every applicant for employment to sign an application, representing that he was not a member of any such organization, or that, if he was, he would withdraw therefrom. Some years after, receivers were appointed for the company, who continued the same rule and practice; and issued a notice, stating that it was their intention to discharge any employes who were members of labor organizations, unless they severed their connection with them before a certain date. Certain of the employes of the receivers thereupon petitioned the court to restrain the receivers from acting upon this notice. It appeared that all the petitioners had either obtained employment by cancelling their membership in labor

organizations, or had had notice of the rule, and had been employed, in violation of it, by subordinate agents, without the knowledge or consent of the receivers; and no others, differently situated, asked to be made parties. The court accordingly held that the petitioners, who had thus violated a known rule, had no standing whatever to seek to restrain its enforcement; and that, in any case, the court would not direct the receivers to abrogate a rule, established by the owners of the property, and believed by them, and also by the receivers, to be advantageous in its management, inasmuch as it involved nothing unlawful.

This decision is so plainly correct that it needs no commendation; but one may be pardoned for commenting upon the impudence of such a claim, made by men whose avowed purpose is to prevent their employers from employing any one who does not belong to their organizations. They seem to be wholly ignorant of the maxim that he who seeks equity must do equity.

Negligence, Imputed

The Supreme Court of Georgia has rejected the indefensible rule as to imputed negligence declared in *Prideaux* v. *Mineral Point*, 43 Wis. 513, and has decided, in *Roach* v. *Western & A. R. Co.*, 21 S. E. Rep. 67, that the negligence of the driver and owner of a private vehicle, who, by that negligence, contributes to a collision with a locomotive, is not imputable to another person riding in the vehicle by invitation, unless that person had some right or was under some duty to control or influence the driver's conduct; *e. g.*, such a right as might arise from their being engaged in a joint enterprise for their common benefit; or such a duty as might arise from the known or obvious incompetency of the driver, resulting, for instance, from drunkenness, or other cause.

That court had already decided, in *East Tenn., Va. & Ga. R. Co.* v. *Markens*, 88 Ga. 60; S. C., 13 S. E. Rep. 855, that a passenger in a public hack is under no duty to supervise the actions of the driver at a public crossing, nor to look for approaching trains, unless she has some reason to distrust the

driver's diligence in regard to such matters; and had prescribed the limits of the imputation of the custodian of a minor child to its parents, in *Atlanta & Air-Line Ry. Co.* v. *Gravitt*, 20 S. E. Rep. 550; 2 AM. L. REG. & REV. (N. S.) 97.

Public Contracts, Injunction

An injunction will not lie to restrain a school board from awarding a contract to one who is not the lowest bidder, when the board reserved the right to reject any and all bids, where there is no evidence of fraud on the part of the bidder, and where there is no statute requiring contracts to be awarded to the lowest bidder: *Chandler* v. *Board of Education of City of Detroit*, (Supreme Court of Michigan,) 62 N. W. Rep. 370.

A taxpayer may enjoin a void contract: *Beebe* v. *Board of Supervisors of Sullivan Co.*, 64 Hun. (N. Y.) 377; *Wormington* v. *Pierce*, 22 Oreg. 606. But one company cannot enjoin another company and the board of commissioners appointed to let public contracts for the state from proceeding under a contract to bind state documents, awarded by the said board to the latter company, though that company has failed to give bond as required by law, and though its bid was not so low as that of the complainant, if the suit is not brought on behalf of the state or as a taxpayer; such contracts, and the provisions of the statute prescribing the manner of letting them, being intended to protect the public interests, and not those of individuals, as such: *Arkansas Democrat Co.* v. *Press Printing Co.*, (Ark.,) 21 S. W. Rep. 586.

Public Officer, Railroad Passes

A notary public is a public officer, within the meaning of a constitutional provision that any public officer who shall travel on a free pass shall forfeit his office: *Peo.* v. *Rathbone*, (Supreme Court of New York,) 32 N. Y. Suppl. 108.

Quo Warranto, Fines

When a public office is intruded into, without color of right, the court, on *quo warranto*, will impose such a fine upon the usurper, as appears, under the circumstances of the case, to be proper: *State* v. *Davis*, (Supreme Court of New Jersey,) 31 Atl. Rep. 218.

Release and Discharge, Railroad Relief Association

The Supreme Court of Nebraska, in *Chicago, Burlington & Quincy R. R. Co.* v. *Bell*, 62 N. W. Rep. 314, has given a clear exposition of the legal status of a railroad relief department, and the binding effect of the contract by which an employe, receiving aid from the department, agrees to release all claims against the company for injuries. It holds: (1) That in the absence of all evidence on the subject, it cannot be presumed that the establishment and operation of such a department is an act *ultra vires*; (2) That the contract aforesaid does not lack consideration; (3) That the promise made by the employe to the relief department for the benefit of the railroad company is available to the latter, either as a cause of action, or as a defence; (4) That such a contract is not against public policy; (5) That the effect of the contract is not to enable the railroad company to exonerate itself by contract from liability for the negligence of itself or its servants; (6) That the employe does not, by such a contract, waive his right of action against the railroad company for injuries due to its negligence; (7) That it is not the execution of the contract that estops the employe from recovering for injuries due to the negligence of the company, but his acceptance of moneys from the relief department on account of such injuries, after his cause of action against the company has accrued; and that therefore, (8) When an employe of the railroad, who is also a member of the relief department, has been injured through the negligence of the company, and has received money from the funds of the relief department, on account of the injury, he cannot recover from the company, in an action for damages for that injury, in the absence of proof that he was induced to become a member of the relief department, or to execute the contract and release, or to accept the money paid him by the relief department, through fraud or mistake.

This is in full accord with the almost unanimous current of decision. In every reported case, except one, the courts have held the agreement to release the company on receiving benefits from the relief department good, because it does not absolutely deprive the employe of his right of action against

the company, but merely puts him to an election between a suit for damages and the acceptance of benefits: *Owens* v. *B. & O. R. R.*, 35 Fed. Rep. 715; *Johnson* v. *P. & R. R. R.*, (Pa.,) 29 Atl. Rep. 854, affirming 2 D. R. (Pa.) 229. This distinguishes such a release from an absolute undertaking to release the employer from all liability as a condition of being received into service. The latter has always been held invalid: *Roesner* v. *Hermann*, 8 Fed. Rep. 782; *Kans. Pac. Ry. Co.* v. *Peavey*, 29 Kans. 169; *Lake Shore & M. S. Ry. Co.* v. *Spangler*, 44 Ohio St. 471. Such a contract, also, is not bad for want of mutuality, when the company is a member of the association, and a party to the contract by which the employe becomes a member: *Leas* v. *Penna. Co.*, (Ind.,) 37 N. E. Rep. 423.

The question of consideration is a more serious one. It is not so apparent at first sight that any consideration moves from the company; but an investigation of the affairs of such associations will almost always show that the company is itself a contributor to the funds of the department, guarantees any deficit that may happen, and pays the running expenses. This is of course a valuable consideration; and can hardly be said to be insufficient. For instance, the Reading Railroad contributed $100,000 to its relief department at its formation; the Baltimore & Ohio contributed the same; and the Chicago, Burlington & Quincy had, at the time of the Bell suit, contributed over $110,000 to its relief department. These sums certainly bore a fair proportion to the contributions of the members of the association.

There is one serious objection, however, to the validity of such a release, in certain cases. Where membership is voluntary, as in the C., B. & Q. and Pennsylvania Company departments, there can be no question of the binding force of the contract. The contract is mutual, and rests on a valuable consideration, as has been shown; and the employe contracts as a free agent. But when membership is compulsory, as in the Reading, B. & O., and London & Northwestern relief departments, it can hardly be claimed that the employe is wholly free to make his choice. It is true that he is not bound to

release the company. He may sue it; but then he loses the contributions which he has been forced to pay into the relief department. It is not a sufficient answer to this that he is not bound to accept employment on the railroad. The company has no right to require such a contract of him. It is an unconscionable one, and one that the courts ought not to enforce. And still less is it an answer to say, *without assigning reasons for it*, that the contract is for the advantage of the employe, as has been said in *Johnson* v. *P. & R. R. R.*, (Pa.,) 29 Atl. Rep. 854, and by the Court of Appeal of England, of whom one would expect better things, in *Clements* v. *London & N. W. Ry. Co.*, [1894] 2 Q. B. 482. In such a case, (though not in that,) the criticism of Hallett, J., in *Miller* v. *C., B. & Q. R. R.*, 65 Fed. Rep. 305, applies with full force: "Having paid for benefits, on what principle can he be required to renounce them?" This distinction, however, has been overlooked by the courts, and it has even been held that an infant, entering the employ of a railroad which made membership in the relief association a condition of service, was bound by the contract of release: *Clements* v. *London & N. W. Ry. Co.*, [1894] 2 Q. B. 482.

One case is opposed to this consensus of opinion: *Miller* v. *C., B. & Q. R. R.*, 65 Fed. Rep. 305. But this, though strongly argued by the judge, was a case of voluntary membership, and therefore the release would, in the absence of fraud or mistake, be unquestionably valid.

But while it seems to be settled, for the present at least, that the employe himself will be bound by the release, in case he elects to receive benefits from the relief association, it does not bar the rights of others to recover for injuries to the employe; and therefore the widow and children are not debarred from action against the company, unless they have executed individual releases. Even if the widow has accepted benefits and given a release, she will not be barred from bringing an action as administratrix on behalf of her children: *C., B. & Q. R. R.* v. *Wymore*, 40 Neb. 645; S. C., 58 N. W. Rep. 1120. But if a widow releases her right of action in order to enable the mother of the employe, who was designated as the beneficiary,

to recover benefits, she will be barred thereby: *State* v. *B. & O. R. R.*, 36 Fed. Rep. 655; and it has been held that if the wife and child recover damages, the mother cannot recover benefits: *Fuller* v. *B. & O. Employes' Relief Assn.*, 67 Md. 433; S. C., 10 Atl. Rep. 237. This, however, is rank injustice. The two claims rest on a different footing. Neither is bound by the release in the contract of membership; and their rights are entirely distinct, neither depending in the slightest degree on the other. The ruling is indefensible.

Finally, there may be a distinction between cases where the release is only found in the contract of membership in the relief association, and those in which the prudence of the company exacts a new release on the acceptance of benefits: *Martin* v. *B. & O. R. R.*, 41 Fed. Rep. 125; *Graft* v. *B. & O. R. R.*, (Pa.,) 8 Atl. Rep. 206; *Spitze* v. *B. & O. R. R.*, 75 Md. 162; S. C., 23 Atl. Rep. 307. This, however, is doubtful. If the contract is good in the first instance, the second release is superfluous; if it is bad, the requirement of a new release as a condition of receiving benefits is but an act of coercion, and an attempt to evade liability, which should not be countenanced.

Even if the release of the railroad is good, it is doubtful whether the provision that no benefits shall be paid if the company is sued, is valid. That contract seems to be wholly without consideration. The employe, in case he sues the company, forfeits all contributions, and the relief association receives the benefit of them, without the slightest return.

Schools, Decision of State Superintendent, Mandamus to Enforce

The Supreme Court of New Jersey has lately held, that the judgment of the state superintendent of schools is as conclusive on the matters over which authority is given him to decide, as the judgment of a legally created court of limited jurisdiction, acting within the bounds of its authority, would be; and therefore a teacher, who has successfully litigated before the state superintendent the disputed questions on which her right to compensation depends, is entitled to a writ of mandamus to enforce a decision in her favor; and in such a case it is only necessary for the relator to show that the state

superintendent had jurisdiction of the matter in dispute, and over the parties to the controversy: *Thompson* v. *Board of Education of Borough of Elmer*, 31 Atl. Rep. 168.

Taxation, Income Tax

The Supreme Court of the United States, though technically deciding it, has yet left the Income Tax question in a state of uncertainty by a division of opinion, Justices HARLAN, BROWN, SHIRAS and WHITE being in favor of the constitutionality of the law, and Chief Justice FULLER and Justices FIELD, GRAY and BREWER holding it unconstitutional. This, of course, means a reargument of the points in dispute as soon as Mr. Justice JACKSON is able to sit. The rulings, in brief, were these: The court decided, against the dissent of Justices HARLAN and WHITE, (1) That so much of the act as attempted to impose a tax upon the rental or income of real estate, as such taxes are direct taxes, is unconstitutional; and (2) That so much of the act as attempted to levy a tax on municipal lands is unconstitutional. But the Justices were divided on the following questions: (1) Whether the void provisions as to rents and income from real estate invalidate the whole act; (2) Whether as to the income from personal property as such, the act is unconstitutional as laying direct taxes; (3) Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested. It is to be hoped that we may soon have a final decision of these questions.

Telegram, Delivery, Delay

According to a recent decision of the Court of Civil Appeals of Texas, when a telegram is sent to an address outside of the telegraph company's free-delivery limits, but without notifying the sender that the address is outside of those limits, and the agent at the receiving office has been for years in the habit of sending messages outside such limits by hackmen and others, without extra charge, and undertakes to do the same with the telegram in question, the company is liable for the delay of the person who undertakes to deliver the telegram, though the form in which it is sent exempts the company from

liability for delay in delivering the message outside its free-delivery limits: *Western Union Tel. Co.* v. *Womack*, 29 S. W. Rep. 932.

When, at the opening of a term of court, the judge has the court-house clock set by true sun time, given by a sun-dial, and the sessions of the court are held according to that clock, the hour at which the term expires will be fixed by the true sun time, and not by what is known as "standard" time: *Parker* v. *State*, 29 S. W. Rep. 480.

Time, Computation

The presumption always is that common time is meant. If the return of a summons issued by a justice of the peace is to be made according to standard time, the summons should so state, or it will be presumed that it was to be returned according to common time: *Searles* v. *Averhoff*, 26 Neb. 668; S. C., 44 N. W. Rep. 872. In Georgia, the only time recognized by law is common time, based on the meridian; and standard time cannot be substituted at will for that recognized by law: *Henderson* v. *Reynolds*, 84 Ga. 159; S. C., 10 S. E. Rep. 734.

Trees growing in a city street are under the control of the city, and it may have them cut down, to make room for a sidewalk, even though the fee of the street does not belong to the city: *City of Mt. Carmel* v. *Shaw*, (Supreme Court of Illinois,) 39 N. E. Rep. 584.

Trees, Removal by City

The House of Lords has recently decided, that the owner of land overhung by trees growing on his neighbor's land is entitled, without notice, to cut the branches so far as they overhang, provided that he does not trespass on his neighbor's land; even though they have so overhung for more than twenty years: *Lemmon* v. *Webb*, [1894] App. Cas. 1; affirming [1894] 3 Ch. 1. See 1 AM. L. REG. & REV. (N. S.) 822.

Removal of Overhanging Branches

When a witness to a will is unable to write, and his signature is written, at his request, by another person, but the witness neither touches the pen nor the hand of the person who does the writing, the subscription is invalid: *McFarland* v. *Bush*, (Supreme Court of Tennessee,) 29 S. W. Rep. 899.

Wills, Witness, Signature

Witness, Fees, Expert

The Supreme Court of Arkansas, following the weight of authority, has recently held, that, in the absence of express statutory authority, an expert who testifies for the state in a criminal case cannot demand extra compensation as an expert, in addition to the usual witness fees, at least when he is not compelled to make any preliminary examination or preparation, and is not compelled to attend and listen to the testimony: *Flinn* v. *Prairie Co.*, 29 S. W. Rep. 459.

When no demand is made in advance for special compensation, an expert witness can recover only the statutory witness fees: *Board of Commissioners of Larimer Co.* v. *Lee*, 3 Colo. App. 177; S. C., 32 Pac. Rep. 841.